Catholic University Law Review

Volume 24
Issue 2 *Winter 1975*

Article 3

1975

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THE CONCLUSIVE PRESUMPTION CASES: THE SEARCH FOR A NEWER EQUAL PROTECTION CONTINUES

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"In strictness, there cannot be such a thing as a 'conclusive presumption.' "—Wigmore[1]

A hallmark of the Warren Court was its use of two essentially antithetical standards of review to resolve equal protection issues. In most instances,[2] judicial review of legislative classifications for satisfaction of the equal protection clause would follow the traditional model[3] of deference in the extreme, with the Court readily straining to hypothesize legislative purposes arguably served by the classification. During the Warren Court era, however, a "new" equal protection[4] to complement this older approach clearly emerged.[5] A diametrically opposed standard of scrutiny obtained, then, if the Court found that the law under review deprived some persons of a "fundamental interest"[6] or divided the population into groups advantaged or disadvantaged by means of a "suspect classification."[7] Where either of these conditions was satisfied, the typically indulgent review of state laws for comportment with the requirements of equal protection gave way to a demand for far more perfection in

* B.A., 1971; J.D., 1974, Yale.

1. 9 J. WIGMORE, EVIDENCE § 2492, at 292 (3d ed. 1940).

2. *See, e.g.*, McDonald v. Board of Election, 394 U.S. 802 (1969); Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961) (plurality opinion of Warren, C.J.); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

3. *See, e.g.*, F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Ozan Lumber Co. v. Union County Nat'l Bank, 207 U.S. 251 (1907). *See generally* Tussmann & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

4. *See generally* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716 (1969).

5. For earlier signs of this development, see Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942).

6. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Williams v. Rhodes, 393 U.S. 23 (1968).

7. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385 (1969); Loving v. Virginia, 388 U.S. 1 (1967); *cf.* Levy v. Louisiana, 391 U.S. 68 (1968).

classification.[8] And while laws were rarely found to run afoul of the older, minimum rationality test,[9] few laws survived the "strict scrutiny" of the new test.[10]

With Justice Marshall leading the way on the Court,[11] this "rigidified"[12] approach to interests and classifications has come under increasing attack in recent years.[13] Elevation of interests and classifications to fundamental and suspect status, respectively, is troublesome because of the major commitment made thereby to scrutinize all laws involving such interests and classifications, and the almost inevitable invalidation of all such laws subjected to this intense review. On the other hand, though interests may be less than fundamental and classifications less than suspect in the Court's view, they will often be deserving of far more protection than the usual confirmation of rationality affords. Perhaps, then, to give these "intermediate" interests and classifications their due, no more and no less, the Court might require varying degrees of perfection in shaping legislative means to ends depending on the impor-

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8. To justify a law depriving certain persons of a fundamental interest, the state must demonstrate that the measure is necessary to the accomplishment of a compelling state interest. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969). If the state can show a compelling reason for the deprivation, it must then go on to prove that its interest is being pursued with the least possible infringement on the fundamental right. Where adoption of a less drastic alternative, one more discriminating in its impact, is believed by the Court to be feasible, the law under review will be held unconstitutional.

Where a suspect classification is at issue, the state need not prove that the law is supported by a compelling interest on its part. If the classification is imperfect, however, over- or underinclusive, the state must show that the classification selected represents the best possible one given the time pressures for its formulation. An immediate need to classify would thus justify imprecision in the process. *Cf.* Lee v. Washington, 390 U.S. 333, 334 (1968) (Black, Harlan & Stewart, JJ., concurring); Korematsu v. United States, 323 U.S. 214, 219 (1944). *See generally* Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1245-52 (1974).

9. Among the few Warren Court exceptions are Rinaldi v. Yeager, 384 U.S. 305 (1966); Morey v. Doud, 354 U.S. 457 (1957). Earlier "irrational" classification cases include, *inter alia*, Hartford Co. v. Harrison, 301 U.S. 459 (1937); Smith v. Cahoon, 283 U.S. 553 (1931); Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32 (1928).

10. The Virginia divorce law in Tancil v. Woolls, 379 U.S. 19 (1964), appears to be the single Warren Court survivor of strict scrutiny. Suggestion of another law which would satisfy this standard occurs in three Justices' concurrence to Lee v. Washington, 390 U.S. 333, 334 (1968) (Black, Harlan & Stewart, JJ., concurring). The orders reviewed in the World War II internment cases, Korematsu v. United States, 323 U.S. 214 (1944), and Hirabayashi v. United States, 320 U.S. 81 (1943), complete the list of exceptions to date.

11. *See generally* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting).

12. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

13. *See also* Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring).

tance of the interest affected and the degree of suspicion attending a legislature's use of the particular classification.[14]

This vocal minority of the Court was not alone in its criticisms, moreover, for the Court's critics, most notably Professor Gerald Gunther,[15] added vigor to the erosion of the Warren Court's dichotomy. In his review of the Court's 1971 term, Professor Gunther not only endorsed the "sliding-scale"[16] formula suggested by Justice Marshall, but also attempted to demonstrate that a majority of the Court had already adopted the new test sub silentio.[17] Lower courts were not long in explicitly applying this received wisdom,[18] but the Supreme Court has proved less than accommodating. Apparently anxious to preserve its options, if not to repudiate the Gunther thesis entirely, the Court followed with several resounding affirmations of the Warren Court's "two-tiered"[19] test.[20] If, then, the Court is indeed searching, as Professor Gunther has maintained, for a "newer" equal protection to deal with interests and classifications not sufficiently significant or untrustworthy for constitutional recognition as "fundamental" or "suspect," these recent cases indicate at the very least that the Court has not yet settled on the sliding-scale as the solution.

But as the sliding-scale has risen to and, it seems, fallen from prominence,[21] another mode of constitutional analysis long essentially dormant has

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14. *Cf.* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting) ("the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn").

15. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972). *See also* Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91, 92-99 (1966); Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 33-39 (1969).

16. Gunther, *supra* note 15, at 17-18.

17. *Id.* at 25-37. While Professor Gunther tried to prove this proposition with respect to the 1971 term, Justice Marshall in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), argued its descriptive validity with respect to the Court's equal protection decisions over the last thirty years.

18. *See, e.g.,* Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973) (three-judge court), *rev'd sub nom.* Geduldig v. Aiello, 417 U.S. 484 (1974); Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), *rev'd,* 416 U.S. 1 (1974).

19. Gunther, *supra* note 15, at 17.

20. *See* Kahn v. Shevin, 416 U.S. 351, 355-56 & n.10 (1974); Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

21. On the uncertain existence at any time past of sliding-scale rationality, see Note, Boraas v. Village of Belle Terre: *The New, New Equal Protection,* 72 MICH. L. REV. 508, 533-36 (1974).

experienced an unmistakable revival in the Supreme Court: the conclusive presumption. Somewhat of a misnomer—for the essence of a "presumption" is its rebuttable, inconclusive quality[22]—"conclusive presumption" describes a rule of law which irrebuttably takes B as established from proof of A. The Court has traditionally measured the validity of a conclusive presumption against the fifth and fourteenth amendments' guarantees of due process.[23] An understanding of the functional significance of the recent conclusive presumption cases, however, becomes possible only against the backdrop of equal protection theory, which has already been sketched and to which I shall return. By elucidating the difficulties and potentialities presented by the Court's use thus far of the conclusive presumption technique, an attempt will be made in this article to locate the Burger Court's conclusive presumption cases within recent developments in equal protection as an alternative to the sliding-scale in the problematic "middle zone" of equal protection review.

I. THE NATURE OF THE EXPERIMENT

Cleveland Board of Education v. LaFleur[24] marked the Court's fourth invocation of conclusive presumption reasoning since 1972.[25] In *LaFleur* and

22. *See* C. MCCORMICK, EVIDENCE § 342, at 804 (2d ed. 1972); 9 J. WIGMORE, EVIDENCE § 2492, at 292 (3d ed. 1940).

23. *See* Heiner v. Donnan, 285 U.S. 312 (1932); *cf.* Manley v. Georgia, 279 U.S. 1 (1929).

24. 414 U.S. 632 (1974).

25. Justice Rehnquist to the contrary, Jimenez v. Weinberger, 417 U.S. 628 (1974), does not mark the Court's fifth conclusive presumption case. The eight-member majority in *Jimenez* struck down as a violation of equal protection (applicable to the federal government as a matter of due process, *see* Bolling v. Sharpe, 347 U.S. 497 (1954)) a provision of the Social Security laws distinguishing among types of illegitimate children for purposes of determining eligibility for insurance benefits upon a wage-earner parent's disability. Since the classification was not based on legitimacy of birth but instead on characteristics differentiating illegitimates from one another, cases intimating the suspect status of legitimacy classifications, *see* note 72 *infra*, were not in point. Rationality, not perfection, in classification would thus be the standard of review applied by the Court. In Justice Rehnquist's view, however, the Court attended to the standard's over- and underinclusiveness with far more rigor than appropriate under a rationality test. Accordingly, he explained the Court's review as being not rooted in equal protection theory at all but instead as a sub rosa invocation of conclusive presumption doctrine. Indeed, he could point to some language in the Court's opinion to support this conclusive presumption characterization of it, *see* 407 U.S. at 639. Nevertheless, the degree of scrutiny given the classification by the Court is not as irreconcilable with a rational connection test and equal protection analysis as Justice Rehnquist would have it. For whatever the descriptive validity, *see* note 21 *supra*, or current applicability, *see* p. 219 *supra*, of his sliding-scale equal protection theory, Professor Gunther does point to cases in the 1971 term which indicate that a rational connection test can have some punch. *See generally* Gunther, *supra* note 15. *See also* Baxstrom v. Herold, 383 U.S.

its three predecessors, *Stanley v. Illinois*,[26] *Vlandis v. Kline*,[27] and *United States Department of Agriculture v. Murry*,[28] the Court has sought to minimize this development by explaining two cases of the past decade, *Bell v. Burson*[29] and *Carrington v. Rash*,[30] in conclusive presumption terms. In *Bell*, however, with a law before it requiring an uninsured driver involved in an accident to either post security or suffer suspension of his license prior to any determination of fault, the Court made no mention of any "conclusive presumption." Indeed, far from analyzing the case in terms of an irrefutable presumption of fault from proof of involvement in an accident—the Court's retrospective characterization of *Bell* in *Stanley*[31] and *Vlandis*[32]—the Court placed the instant facts within the *Goldberg v. Kelly*[33] line of authority regarding the process due a party denied government largess[34] and the obsolescence of the right/privilege doctrine.[35] And the reliance on *Carrington* was equally unconvincing as an attempt to fit *Stanley* and its successors within the mainstream of contemporary jurisprudence. The *Carrington* Court analyzed the challenged Texas prohibition against the establishment of a Texas voting residence by non-Texans in the military in strictly equal protection terms; conclusive presumption, however, is doctrinally a due process concern. The single reference to conclusive presumption in the case—the Court's characterization of the law's underlying premise that all non-Texans in the military do not intend to become permanent residents[36]—was thus no more than metaphorical, simply one way of emphasizing the overinclusiveness of this measure to protect the franchise from transients. The careful scrutiny of relative perfection in classification was triggered, then, not by recognition of a conclusive presumption but instead by the infringement of an interest of fundamental constitutional stature, voting,[37] in possible violation of the equal protection clause.

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107 (1966) (New York procedures for civil commitment of persons at end of prison term irrational and invalid to the extent to which they differ from procedures for civil commitment of persons not imprisoned immediately prior to attempted commitment). In light of these developments in equal protection, then, Justice Rehnquist's characterization of *Jimenez* as a conclusive presumption case seems misplaced.

26. 405 U.S. 645 (1972).
27. 412 U.S. 441 (1973).
28. 413 U.S. 508 (1973).
29. 402 U.S. 535 (1971).
30. 380 U.S. 89 (1965).
31. 405 U.S. at 653.
32. 412 U.S. at 446-47.
33. 397 U.S. 254 (1970).
34. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964).
35. *See* Bell v. Burson, 402 U.S. 535, 539 (1971).
36. 380 U.S. at 96.
37. *Id.* ("matters close to the core of our constitutional system"). The fundamental-

For support in precedent for its latest forays into conclusive presumption territory, the Court must look back forty and fifty years to cases invalidating estate tax laws which operated by the conclusive presumption that gifts made within x years of death are made in contemplation of death.[38] As manifestations of substantive due process, however[39]—a basis for judicial review frequently renounced by the Court since the 1940's[40]—these cases provide less than venerable support for the Court's present activities.

A. The Cases and the Express Framework

Given this dearth of support for conclusive presumption analysis in modern precedent, the Court's employment of this line of reasoning in *Stanley v. Illinois*, the earliest of the four recent conclusive presumption cases, is striking for its matter-of-factness. Mr. Stanley, the father of three illegitimate children, challenged an Illinois law depriving unwed fathers of their offspring upon the mother's death. All other classes of parents would only lose custody of their children to the state if the state could prove parental unfitness in a neglect hearing. Although the equal protection clause offered the obvious route for dealing with this claim of unequal treatment of persons similarly situated[41]—and, indeed, was endorsed as an alternative ground for decision by four members of the seven-Justice *Stanley* Court[42]—five Justices sub-

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ity of voting, affirmed in cases prior to *Carrington, see, e.g.*, Reynolds v. Sims, 377 U.S. 533, 561-62 (1964), would soon be most forcefully propounded in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). On the exercise of strict scrutiny in *Carrington* pursuant to a finding of a fundamental interest, see Shapiro v. Thompson, 394 U.S. 618, 660 & n.8 (1969) (Harlan, J., dissenting). For an attempt to reconcile the fundamental stature of voting with the Court's deference to voting classifications based on age, United States citizenship, in-state residency and past commission of a felony, see Note, *supra* note 8, at 1255-56 n.77.

38. Heiner v. Donnan, 285 U.S. 312 (1932); Schlesinger v. Wisconsin, 270 U.S. 230 (1926). The effect of the conclusive presumption would therefore be to include such gifts in the donor's gross estate for estate tax purposes.

39. *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915). *See also* Vlandis v. Kline, 412 U.S. 441, 467-68 (1973) (Rehnquist & Douglas, JJ., & Burger, C.J., dissenting).

40. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952). Substantive due process may be more honored in practice, however, than these formulaic denunciations would seem to indicate. *Cf.* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

41. Neither the parties nor the Illinois Supreme Court appears to have noticed any other constitutional problem. *See* Brief for Petitioner at 3, Stanley v. Illinois, 405 U.S. 645 (1972); Brief for Respondent at 10, *id.*; *In re* Stanley, 45 Ill. 2d 132, 256 N.E.2d 814 (1970).

42. 405 U.S. at 658.

scribed to a disposition of the case according to the due process requirements attending conclusive presumptions. Thus, the Court did not impugn the legitimacy of the state's objective—to protect the well-being of children within its jurisdiction. The Court did find constitutional defect in the means chosen to effectuate this purpose, however, for the law presumes as irrebuttably true from proof of one's status as an unwed father a fact that does not necessarily follow: that a person occupying this status is unfit to care for his children.[43] Even assuming most unmarried fathers may not be fit to bring up their children alone, some undoubtedly can effectively perform this function; and, the Court further reasoned, due process thus demands that any individual in this disadvantaged class have the opportunity to prove the imperfection of the presumption as regards him. The Court was careful to stress, however, that the defect lay not in the classification per se but instead in the lack of process given one within the disadvantaged class to escape it. Accordingly, the legislature need not abandon the presumption altogether and, indeed, could even place the burden of its rebuttal on the persons singled out for deprivation.[44]

Vlandis v. Kline, the Court's next conclusive presumption case, mirrors *Stanley* in both its analytic technique and the remedy prescribed. Before the Court was the constitutionality of Connecticut's definition of "resident" for purposes of qualification for lower tuition and other reduced fees in the state university system. Any married student living outside the state at the time of application or any single student living outside at any time during the year preceding application were not "residents" within the meaning of the statute. Thus classified, they were forced to matriculate, if they still so desired, at the higher non-resident rates for the full time of their attendance at the school. Their exclusion from resident status, the state contended, was designed to serve the legitimate state objective of equalizing costs between bona fide residents and nonresidents; the legislature's theory was thus that bona fide residents compensate for the differential in university costs by past and future tax contributions. In the Court's view, though, a constitutional infirmity lay in presuming irrebuttably for purposes of securing this objective that nonresidence at the time of application (for married students) or during the year preceding application (for single students) signifies a lack of intent to remain permanently in Connecticut.[45] Perhaps most students excluded from resident status may not have come to Connecticut as bona fide residents, but rather simply to attend its state university. Some within this class, on the other hand, surely do come with the intention of establishing permanent

43. *Id.* at 647 n.13.
44. *Id.* at 657 n.9.
45. 412 U.S. at 448.

residency. Since, as in *Stanley*, the state can by "reasonable alternative means"[46] be more precise in its classification—here, in segregating bona fide residents and there, fit parents—it is bound by the fourteenth amendment to provide that greater degree of process and individualized treatment, the higher costs of administering such a system notwithstanding. Again, however, it is not the classification and underlying presumption that are declared off-limits but only this application of the classification unrefined by an opportunity for individual rebuttal with additional relevant criteria.

A provision of the Federal Food Stamp Act afforded the next occasion for the conclusive presumption characterization in *United States Department of Agriculture v. Murry*. Under the Act a household would be ineligible for food stamps for the tax period during which one of its members of 18 years or older is claimed as a dependent by a non-member taxpayer not eligible himself for stamps, and for the year thereafter. Once more, not in question is the constitutionality of the purpose arguably served by the exclusionary measure: to guard against expenditures to the non-needy and thus preserve funds for those truly in need. The means chosen to implement this end, however, operates on the basis of a conclusive presumption—that households identified by the provision described above are not needy[47]—which, for two reasons, fails to survive constitutional review. First, as concerns the household member listed as a dependent, satisfaction of that individual's needs during the year of tax dependency hardly warrants the conclusion that his needs require no subsidy in the subsequent year. Secondly, an irrefutable inference from one member's non-indigent status in the past year to the entire household's during that and the following year plainly partakes of gross imperfection. Congress' highly imprecise separation of the fraudulent from the needy can thus not be allowed to stand. But the Court's reasoning would not preclude retention of the present classification provided that it were buttressed by an opportunity for individual rebuttal of the veracity of the underlying presumption in the specific case. On the other hand, since another classification might more cheaply satisfy the announced due process requirements for greater individualization in determining need, Congress might well opt for a different, more precise means of effectuating the legislative end.[48]

These alternative remedies to due process deficiencies—greater precision in legislative classification and a broader opportunity to contest the classification at the administrative level—are perhaps elucidated most clearly in *Cleveland Board of Education v. LaFleur*, the Court's latest encounter with the traditionally "disfavored"[49] conclusive presumption. The two school

46. *Id.* at 451.
47. *See* 413 U.S. at 511.
48. *Cf. id.* at 517 n.2 (Stewart, J., concurring).
49. 414 U.S. at 644, *quoting* Vlandis v. Kline, 412 U.S. 441, 446 (1973).

board rules under review required pregnant teachers to relinquish their positions without pay at four and five months prior to the expected childbirth. In defending these rules as helping to ensure physically able teachers in the classroom, the state relied on, according to the Court, a conclusive presumption—that women after four and five months of pregnancy are necessarily unfit to teach[50]—which deviates substantially from reality.[51] And by analogous reasoning, the Court found constitutionally defective a rule categorically prohibiting resumption of duties until three months after the child's birth. Significantly, as if to illustrate the appropriate remedy to these denials of due process, the *LaFleur* Court affirmed the validity of a rule which required mothers seeking reinstatement to come forward with evidence of their fitness.[52] The Court noted, however, that individualized determinations of fitness were not necessarily the only constitutional method of securing the state's interest in competent and continuous instruction; a regulation more carefully tailored to the legislative end might well withstand judicial scrutiny.[53] Some imperfection in classification, therefore, would probably be lawful, though not the amount present in the current rules.

B. The Scylla and Charybdis of Due Process Review

Although the Court's opinions in these four cases cannot be faulted for their elucidation of the imprecision of the conclusive presumptions at issue, they may be criticized for their notable failure to make explicit the considerations triggering conclusive presumption characterization and review in the first place. As the above synopsis of the conclusive presumption cases indicates, when the Court unearths a conclusive presumption, it is a signal that the law under review will have to be remedied by making its presumption rebuttable—or, to be technically more correct, that a rule of law must give way to a presumption. The Court's announcement that a conclusive presumption is now before it, however, should not be allowed to obscure the Court's preliminary decision to translate the classification under consideration into conclusive presumption terms. The Court's attachment of the label of "conclusive presumption" to the stereotypical underpinnings which explain the relation between means and end of these legislative enactments, therefore, hardly justifies treating these laws differently from any others, for stereotype and broad comparative generalization are the essence of the classification process by which all laws are generated. Thus, although the laws in these cases involve conclusive presumptions, so do all laws.

50. 414 U.S. at 647.
51. *Id.* at 645-46 & n.12.
52. *Id.* at 650.
53. *Id.* at 647 n.13.

If not self-evident, this proposition, which lies at the heart of Chief Justice Burger's and Justice Rehnquist's dissents in these cases,[54] may be confirmed by reference to a few classifications which the Court has upheld as satisfying the minimum rationality equal protection test without noting any difficulties of conclusive presumption. Thus, in *Williamson v. Lee Optical Co.*,[55] the Court affirmed the validity of a law allowing all sellers of ready-to-wear glasses, but not opticians, to fit lenses and to duplicate and replace them without a prescription from an optometrist or ophthalmologist; no attention was paid the easily-constructed and plainly imperfect conclusive presumption that all opticians are not competent to perform these tasks. In *Railway Express Agency v. New York*,[56] a New York City traffic regulation allowing business vehicle owners to advertise their own businesses, but not those of others, by signs on the vehicle received Supreme Court approval as a means to promote traffic safety; the underlying and obviously imprecise conclusive presumption, that all vehicle owners advertising another's wares necessarily create a traffic hazard, was never considered. And, as a final illustration, in the recent case of *Kahn v. Shevin*[57] the Court found constitutional a $500 property tax exemption for widows, but not widowers, without consideration of the implicit irrefutable presumption that all widowers are not in need of this tax advantage. Again, the disadvantage suffered by a group in the classification process is easily characterized as a conclusive presumption constitutionally defective because of its overinclusiveness.

The conclusive presumption analytic model thus threatens displacement of the traditional equal protection review for rationality in comparative generalization—persons in class A are more qualified (or more in need) than those in class B in the following respect(s), which justifies the classification made—in favor of "strict scrutiny"[58] of the overinclusiveness of the disadvantaged group in terms of the legislative objectives. In the absence, then, of a more explicit statement by the Court of the criteria informing its use of the conclusive presumption, the Burger-Rehnquist charge that this line of cases represents "nothing less than an attack upon the very notion of lawmaking itself"[59] cannot be lightly dismissed. Indeed, a potential for arbitrary applica-

54. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 657-60 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508, 522-27 (1973); Vlandis v. Kline, 412 U.S. 441, 459-69 (1973); Stanley v. Illinois, 405 U.S. 645, 659-68 (1972).

55. 348 U.S. 483, 488-89 (1955).

56. 336 U.S. 106 (1949).

57. 416 U.S. 351 (1974).

58. Vlandis v. Kline, 412 U.S. 441, 460 (1973) (Burger, C.J., & Rehnquist, J., dissenting).

59. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 660 (1974) (Rehnquist, J., & Burger, C.J., dissenting).

tion appears to inhere in this technique which recalls Justice Stewart's evocation elsewhere of a bolt of lightning's random selection of its victims.[60]

But if the conclusive presumption is objectionable as a threat to the survival of any classification, however indulgent that classification's review might be under the equal protection standards inexplicably displaced, it may also be faulted for an opposite tendency: the conclusive presumption provides a seemingly ever-available escape route from elevating interests and classifications to fundamental and suspect status, respectively, despite the probable consistency with precedent and societal significance of doing so. In *Bolling v. Sharpe*,[61] the companion case to *Brown v. Board of Education*,[62] for example, the Court might easily have avoided the far-reaching implications of making race a suspect classification by pursuing a conclusive presumption tack instead. The Court's reasoning might have been as follows: laws segregating black and white schoolchildren serve the permissible legislative objective of providing optimal educational opportunities for each child; those children most able to accelerate in their studies (whites) are grouped together as are those least able to accelerate (blacks);[63] these laws thus proceed on an obviously false conclusive presumption, that all blacks lack the ability to accelerate quickly, and accordingly deny blacks their constitutional rights under the due process clause.

The conclusive presumption technique therefore provides ready access to a desired result. And most significantly, it allows the Court to eliminate the law under review with only the narrowest of consequences outside the confines of the case before it. Thus, laws virtually identical to the one invalidated would fall with the latter, but beyond that nothing seems foreclosed. Far different in its implications would be a decision resting on a declaration of suspect classification or fundamental interest. The latter would commit not only the Supreme Court but, perhaps more importantly in light of the inevitable practical limitations on Supreme Court review, every court in the land to strict scrutiny in any future case involving the particular classification or interest given constitutional stature. The Supreme Court might in any event consistently reproduce ad hoc the advantages of declaring an interest fundamental or a classification suspect. Nevertheless, by following this one-case-at-a-time tack when a firm commitment to principle is constitutionally warranted, the Court indefensibly places individual rights in jeopardy in the tribunals charged with the daily administration of justice.[64]

60. Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

61. 347 U.S. 497 (1954).

62. 347 U.S. 483 (1954).

63. *Cf.* Brief for Attorney General of Florida as Amicus Curiae at 19-20, Brown v. Board of Educ., 349 U.S. 294 (1955).

64. *Compare, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973), *with* Doe v. Norton, 365

II. A Model for a Still Newer Equal Protection

By failing to explain the basis for displacing the ostensibly applicable equal protection standards, the conclusive presumption cases thus invite criticism from proponents of more lenient and stricter equal protection review alike. A closer look at the interests and classifications at issue in the four cases, however, reveals a consistency in the use thus far of the conclusive presumption which, if made express by the Court, would go far to silence both wings of critics. In this section, I shall suggest such a defense of the Court's activities by first developing a model to describe this apparent theoretical consistency in the four cases and then testing the model against the cases themselves.

A. An Outline of the Model

Basically, all the decisions may be defended as innovative activity by the Court in dealing with interests and classifications felt to be too significant or untrustworthy to be reviewed under the relaxed standard of equal protection scrutiny, but not significant or untrustworthy enough to qualify for fundamental or suspect status and the accompanying far more rigorous standard of review. The Court has not, then, under this proposed reading of the cases, substituted a due process test for the usual equal protection one. Rather, it has tacitly first addressed the equal protection issue—*i.e.*, which standard of review, rational relation or strict scrutiny, applies to *any* law effecting a deprivation of the interest or classifying along the lines currently under consideration—and in fact decided that the laws in all four cases should be tested only against the less demanding standard.

The validity of the legislative classification per se, however, does not resolve the constitutionality of its strict application. The second step of this model, then, is to determine how much process is owed to one thus classified so that he may prove his deviation from the stereotype justifying the classification.[65] And to answer this, essentially a question of fundamental fairness,

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F. Supp. 65 (D. Conn. 1973) (three-judge court), *prob. juris. noted sub nom.* Roe v. Norton, 415 U.S. 912 (1974) (classification on the basis of legitimacy of birth).

65. The debate among the Justices in Skinner v. Oklahoma, 316 U.S. 535 (1942), points toward this analytic framework. Under review was Oklahoma's Habitual Criminal Sterilization Act, which provided for the sterilization of persons found guilty of two or more felonies involving moral depravity. Justice Douglas, writing for the majority, discerned a denial of equal protection in the statute's application to two-time grand larcenists and its express exception for habitual embezzlers. Chief Justice Stone, on the other hand, found fault not in the classification per se, but rather in the opportunity given those within the class singled out for disadvantage to escape the penalized class:

> I think the real question we have to consider is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of per-

the Court in the conclusive presumption cases balanced the burden imposed by the law on the individual against the burden on the state of providing more individualized determinations.[66] The Court's conclusion in all four cases was that the legislative classifications under review were unduly harsh as presently administered. They required mitigation in the form of a greater opportunity for individuals within the disadvantaged class to rebut the presumption of lack of qualification or need implicitly made and—as with any classification—made conclusively.

The central feature of this model is its attention to individual burdens not deriving from infringement of a fundamental interest or allocated by a suspect classification. The individual burden might be gauged by the significance of the interest affected and the distrust attending the particular classification employed. The former would provide a measure of the seriousness of the deprivation; hence, the more significant the interest, the greater the

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> sonal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process.

Id. at 544 (Stone, C.J., concurring). Although Justice Douglas made mention of this possible due process objection, he explicitly bypassed the issue in favor of the equal protection claim. *Id.* at 538. It remained, then, for Justice Jackson to attempt a reconciliation of the Douglas and Stone positions, and, in doing so, he highlighted the interplay between equal protection and due process analysis:

> I join the Chief Justice in holding that the hearings provided are too limited in the context of the present Act to afford due process of law. I also agree with the opinion of Mr. Justice Douglas that the scheme of classification set forth in the Act denies equal protection of the law. I disagree with the opinion of each in so far as it rejects or minimizes the grounds taken by the other.
>
> Perhaps to employ a broad and loose scheme of classification would be permissible if accompanied by the individual hearings indicated by the Chief Justice. On the other hand, narrow classification with reference to the end to be accomplished by the Act might justify limiting individual hearings to the issue whether the individual belonged to a class so defined. Since this Act does not present these questions, I reserve judgment on them.

Id. at 546 (Jackson, J., concurring).

66. *Cf.* United States Dep't of Agriculture v. Murry, 413 U.S. 508, 517-18 (1973) (Marshall, J., concurring). In reviewing the growing body of literature on these cases published since the essential completion of this article, I discover the controversiality of a basic assumption shared by my model and the latter concurring opinion: that the conclusive presumption cases in fact have a theoretical consistency awaiting elucidation. Thus, even the recent commentary probably most amenable to my analysis, Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974), prefers to treat these decisions as fundamentally confused or misguided. *See also* Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974). *But cf.* Sewell, *Conclusive Presumptions and/or Substantive Due Process of Law*, 27 OKLA. L. REV. 151 (1974).

demand for individualized determination of the appropriateness (in terms of promoting legitimate goals) of applying the deprivation to a particular person. The latter factor in the equation would reflect the likelihood that the deprivation has been wrongly imposed on any individual within the disadvantaged class. As has been argued at length elsewhere,[67] the suspicion attending a classification derives from a suspicion of the process by which the classification is generated: may legislators be trusted to make the generalizations about comparative need or qualification and the cost-benefit balances about the value of greater precision in classification which inevitably inhere in the selection of a classification to effectuate legislative ends?[68] The greater the suspicion of legislative competence to prescribe, therefore, the greater the possibility of imperfection in classification and, hence, the stronger the claim of fundamental fairness for more individualized treatment of persons within the disadvantaged class.

In general, then, the requisite degree of perfection in classification will vary with the product of these elements of significance in interest and untrustworthiness in classification. Criteria of constitutional significance and untrustworthiness thus remain to be articulated. And in this regard the Court appears in its conclusive presumption cases to adhere to guidelines provided by its past equal protection decisions. Thus, as to interests, the Court's thesis seems to be that the Framers designated expressly or by strong implication[69] a select few interests as "fundamental" to a democratic, federal system;[70] other interests acquire a greater or lesser constitutional significance ac-

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67. *See* Ely, *supra* note 40, at 933 n.85; Note, *supra* note 8, at 1250-51.

68. Basically, classifications are least trustworthy when they involve comparative generalizations about two classes of persons, one of which constitutes a majority of the legislature and the other of which lacks both significant representation on the lawmaking body and ability to make substantial input into legislative decisions by means of lobbying force. These "we-they" classifications, *see* Ely, *supra* note 40, at 933 n.85, are thus suspicious because of the personal stake of the "we-group" in skewing the classification in its favor, coupled with the inability of the "they-group" to voice its claims with enough political potency to provide a reliable check against the "we-group's" self-serving tendencies. *See* Note, *supra* note 8, at 1254-57; p. 231 *infra*.

69. "Implication" as used here refers to inference from both textual exegesis and the basic structure of the system. *Compare* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965), *with* Shapiro v. Thompson, 394 U.S. 618, 630 (1969). *See generally* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7-13 (1969).

70. The interests declared fundamental thus far include: interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); voting, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); privacy, Roe v. Wade, 410 U.S. 113 (1973), and Griswold v. Connecticut, 381 U.S. 479 (1965); freedom of association, Williams v. Rhodes, 393 U.S. 23 (1968); freedom of speech, Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972), and Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring in part and dissenting in part); and equal access to nondiscretionary criminal appeals, *compare* Douglas v. Cal-

cording to the degree to which guaranteeing enjoyment of fundamental interests depends upon protection of these subsidiary interests.[71] As concerns classifications, the criterion informing suspect classifications[72]—*i.e.*, whether the law distinguishes between a group represented by a majority of the legislature and another largely excluded from both the legislature and less direct modes of participation in legislative decisions[73]—may be applied with some modification: while the focus in suspect classification cases is polar instances of "outsider" group status,[74] here it would be the relativistic issue of degree of exclusion from the political process.

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ifornia, 372 U.S. 353 (1963), *and* Griffin v. Illinois, 351 U.S. 12 (1956), *with* Ross v. Moffitt, 417 U.S. 600 (1974).

71. *Cf.* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 102 (1973) (Marshall, J., dissenting).

72. The Court has held the following classifications to be suspect: alienage, Graham v. Richardson, 403 U.S. 365 (1971); nationality, Hirabayashi v. United States, 320 U.S. 81 (1943); and race, Bolling v. Sharpe, 347 U.S. 497 (1954). The Court has avoided an explicit statement on the suspect status of classification by legitimacy of birth. Such a statement in the affirmative, however, would appear to be the logical culmination of the Court's recent decisions reviewing legitimacy classifications. Thus, in Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); and Gomez v. Perez, 409 U.S. 535 (1973), the Court found irrational state laws making a child's illegitimacy of birth a disqualification for receipt of statutory benefits by the child or mother, or for state enforcement of paternal support. Movement toward a declaration of suspect status, furthermore, would appear to be confirmed by the intimation of suspect status in *Weber, supra* at 176 n.14, and by the per curiam character of the *Gomez* opinion.

Labine v. Vincent, 401 U.S. 532 (1971), however, where the Court upheld a legitimacy classification for purposes of intestate succession from the father, indicates that this classification may not, in the Court's view, merit strict scrutiny as a suspect classification. The later history of *Labine* in the Supreme Court is informative in this regard. Thus, in *Weber*, the Court underlined the need informing *Labine* for "prompt and definitive determination of the valid ownership of property left by decedents," *Weber, supra* at 170, *quoting* Labine v. Vincent, 229 So. 2d 449, 452 (La. Ct. App. 1969); *cf. Labine, supra* at 554-56 (Brennan, J., dissenting). One might infer from this delimitation of *Labine* by *Weber*, and from the inattention to *Labine* in *Gomez*, that *Labine* has been largely discredited. Another explanation of *Labine*, though, may be that given the enormous difficulties of discovering the decedent's intent—the ostensible thrust of intestacy statutes, *see* E. CLARK, A. GULLIVER, L. LUSKY & A. MURPHY, GRATUITOUS TRANSFERS 55 (1967); Atkinson, *Succession Among Collaterals*, 20 IOWA L. REV. 185, 187-88 (1934)—coupled with the temporal pressures, noted in *Weber*, to settle the status of the intestate landowner's property, the imperfect classification by legitimacy under review in *Labine* constituted the best possible within the time available for formulation. The intestacy statute thus comported with the demands of strict scrutiny, *see* note 8 *supra*, and *Labine* may be read as consistent with an unspoken understanding on the Court of the suspect status of classification by legitimacy of birth.

73. *See* Note, *supra* note 8, at 1245-48. *See also* note 68 *supra*; pp. 241-42 *infra*.

74. Thus, the Court has found race, alienage, and nationality to be suspect because in its judgment blacks, aliens, and foreign nationals are demonstrably impotent in the political process—in effect, "discrete and insular minorities," United States v. Carolene

Insofar as Professor Gunther's,[75] if not also the Court's,[76] sliding-scale equal protection model finds its counterpart in the due process phase of the above model, the crucial difference between the two models and major advantage enjoyed by that implicit in the conclusive presumption cases should at this point be made clear. Basically, the model underlying these cases represents a more flexible manner of dealing with classifications which affect significant interests or are untrustworthy in nature. Equal protection review, whether two-tiered or sliding-scale, requires a court to choose between allowing or denying the legislature the use of the classification under consideration. Either choice may pose substantial problems. On the one hand, placing the classification off-limits to the lawmaker altogether will in many instances prove socially undesirable because the added costs of pursuing the legislative goal through a different classification may require abandonment in whole or part of the specific project or of others also worthy of pursuit. On the other hand, simply indulging legislative employment of the classification may be troublesome because those individuals disadvantaged by the classification who lack the goal-related characteristic(s) informing choice of the classification are made to bear an unjust burden.

The model present in the conclusive presumption cases offers a middle ground between these polar options of equal protection review and thus a means to mitigate the social and individual complications attending the either/or choice presented by equal protection review. Using this approach, a court allows the legislature to retain the existing classification.[77] The state must, however, to ensure constitutionality in application, bear the costs of allowing persons adversely affected by the classification to come forward with proof of considerations indicating the legislature's failure to promote the goals central to the law by disadvantaging them. The legislature may, on the other hand, decide to abandon the original classification if it finds excessive the costs of providing individuals within the disadvantaged class this opportunity to demonstrate the appropriateness of exempting them from its adverse effect. A more precise classification may in the legislature's estimation provide a cheaper means to pursue the desired ends, or the project may of course be left unimplemented in part or whole because of costs made unavoidable by the court's due process mandate. But in any event the decision whether or not to continue with the first classification is the legislature's to make and

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Prods. Co., 304 U.S. 144, 153 n.4 (1938)—and therefore unable to counter with any consistency the self-serving tendencies of a legislature in we-they comparisons and cost-benefit balances. *See* Note, *supra* note 8, at 1257-58 & n.82; note 68 *supra*.

75. *See* Gunther, *supra* note 15.

76. *See* note 21 *supra*.

77. *See* p. 223 *supra*.

not, as it indeed is with equal protection review, precluded by the court. This is not to say that the court has left the cost-benefit balance entirely up to the legislature, for it has decided that the benefit to the individual from greater precision in state processes warrants the higher cost borne by the state to ensure such precision. The court has, though, allowed the legislature greater leeway in its choice of means within judicially-prescribed limits than obtains with equal protection review.

This greater flexibility in classification, moreover, is not achieved at the expense of individual rights, for the court has established requirements of due process proportional to the significance of the interests affected and the untrustworthiness of the classification created. And, indeed, since courts need not take the significantly harsher and more interventionist measure of prohibiting the classification altogether in order to protect personal freedoms, one would suppose that the model underlying the conclusive presumption cases offers more hope than the sliding-scale equal protection test of consistent demonstration by the judiciary of solicitude for individual rights.

B. The Cases Reconsidered

Since the above model attempts to make explicit the constitutional analysis informing the Court's conclusive presumption cases, demonstration of its validity requires a closer look at the cases themselves. The descriptive accuracy of the model must be decided by an evaluation of the interests and classifications at issue for their significant or untrustworthy nature. While the earlier discussions of these decisions focused on what the Court does when it calls something a "conclusive presumption," an attempt will now be made to explain why the Court found conclusive presumptions to be present in the four cases in the first place. In general, then, by reconstructing the cases, I hope to dispel the mist propagated by the invocation of "conclusive presumption," a mist which shrouds considerations central to the Court's decisions.

In *Stanley v. Illinois* the Court had before it a sex classification, a law which patently accorded different treatment to parties similarly-situated except for their difference in sex: mothers of illegitimate children retain custody of their children after the father's death; fathers of illegitimate children lose custody at the mother's death. The interest under consideration was the parental one in the care and upbringing of one's own offspring. In terms of the two-tiered equal protection test, the Court tacitly slotted the instant law in the lower tier. The *Stanley* Court thus did not use the conclusive presumption technique to avoid deciding whether the classification at issue was suspect or the interest fundamental; rather, it implicitly decided both ques-

tions in the negative. At the time, sex was not among the small group of classifications declared suspect by the Court[78] and, in retrospect,[79] seems not to have been a classification which the Court had elevated to suspect status sub silentio.[80] And custody of one's offspring, though related to the constitutional right to privacy announced in *Griswold v. Connecticut*,[81] was apparently not regarded as fundamental itself. Confirmation of this point lies in the Court's opinion in *Eisenstadt v. Baird*,[82] decided in the same term as *Stanley*, where the majority emphasized its dissatisfaction with a bootstrap logic that would read *Griswold* as a basis for the fundamentality of various personal and familial interests. Tested by a rational connection standard, therefore, the Illinois law easily passed muster: the comparative generaliza-

78. *See* note 72 *supra*.

79. In Kahn v. Shevin, 416 U.S. 351 (1974), the Court upheld a $500 property tax exemption for widows. This sex classification was plainly imperfect as an embodiment of the state's goal to subsidize the needy: while most widows may be more needy than most widowers, surely some widows are not as needy as some widowers. Since the applicable standard of scrutiny for suspect classifications is perfection in classification absent exigent circumstances, *see* note 8 *supra*, this classification would have to fall if sex classifications are suspect. That it survived the Court's scrutiny, then, evidences the Court's current view that sex is not a suspect classification.

Nor is it of any significance to this conclusion that the law in *Kahn* ostensibly benefits women, the "they-group" in this classification resting on a we-they (men-women) comparison of relative need. For the taint of self-interest which, along with the political impotence of the "they-group" in trying to counter the bias, makes we-they classifications suspect, *see* notes 68 & 74 *supra*, is one presumed to inform all classifications drawn along suspect lines and make them disadvantageous to the "they-group." This law designed to favor women, therefore, may well rest on a self-serving comparative generalization—we (men) are more intelligent and/or industrious than they (women) are, and thus are not in need of this tax preference—which stigmatizes women. Although the Court avoided this reverse discrimination problem when faced with it in DeFunis v. Odegaard, 416 U.S. 312 (1974), the appropriateness of strict scrutiny for all classifications on the basis of suspect criteria follows from the theory underlying the Court's past suspect classification cases. *See id.* at 336-44 (Douglas, J., dissenting); Note, *supra* note 8, at 1260 n.92.

This reading of *Kahn*, furthermore, draws support from the more recent case of Geduldig v. Aiello, 417 U.S. 484 (1974), where the element of disadvantage to some women was indisputable. There, the Court found "rational" a provision of California's disability insurance system which failed to compensate female workers for disability related to the normal course of pregnancy. *Id.* at 495. The plan did compensate men for male-specific disabilities—prostatectomies and circumcision—and others almost exclusively experienced by men—hemophilia and gout. *Id.* at 501 (Brennan, Douglas & Marshall, JJ., dissenting). In terms of the implications of the decision for the status, suspect or not, of sex classifications in the view of the Court, the dissenters wrote: "The Court's decision threatens to return men and women to a time when 'traditional' equal protection analysis sustained legislative classifications that treated differently members of a particular sex solely because of their sex." *Id.* at 503.

80. *Cf.* Gomez v. Perez, 409 U.S. 535 (1973). *See* note 72 *supra*.

81. 381 U.S. 479 (1965).

82. 405 U.S. 438, 447 n.7 (1972).

tion explaining the classification, that a woman alone is more fit than a man to care for children, is surely at least plausible as a descriptive statement about modern-day society. Though unacceptable were a suspect classification or fundamental interest present, the law's imprecision—undoubtedly *some* men are more qualified than *some* women for this task—presents no equal protection complications under the indulgent, lower tier test.

The classification's satisfaction of the due process demand for individual fairness, however, is judged by a far more discriminating standard. Interests and classifications are viewed as more or less significant or untrustworthy, rather than analyzed only for the polar value of fundamentality or suspectness. The highly untrustworthy nature of sex classifications thus becomes relevant at this point as does the very significant quality of the familial interest implicated. As to the former, since women have long occupied a minority status on legislatures and have had notably insubstantial input into legislative decisions through even indirect channels—as witnessed by the great volume of legislation[83] employing an imprecise sex classification to disadvantage[84] women—the legislative process must be regarded as untrustworthy *enough* in classifying by sex that special attention should be paid imperfection in classification. And with regard to the custodial interest involved in *Stanley*, the Court has in a long line of decisions recognized the substantiality of such familial rights,[85] the absence of legal confirmation of the family bonds notwithstanding.[86] Whether or not itself "fundamental" by virtue of its correlation to the fundamental right of privacy, furthermore, Mr. Stanley's custodial interest is strongly associated with that latter right and acquires significance by virtue of that nexus alone. From another perspective, perhaps the security of the foundational guarantee would be undermined unless solicitude were shown these satellite freedoms. Silent as to the untrustworthy nature of sex classifications, the *Stanley* Court did review the relevant authority and affirm the "cognizable and substantial"[87] quality of the interest affected. But the Court did leave the causal relationship between its finding of an unusually significant interest and its recourse to conclusive presumption theory unhappily blurred—unhappily, that is, because the Court's exacting review of the overinclusiveness of the Illinois law becomes eminently defensible, far less vul-

83. *See generally* Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion); L. KANOWICZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION (1969).

84. On disadvantage and compensatory legislation, see note 79 *supra.*

85. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Prince v. Massachusetts, 321 U.S. 158 (1944); Meyer v. Nebraska, 262 U.S. 390 (1923).

86. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

87. 405 U.S. at 652.

nerable to charges of arbitrariness and avoidance, once the two-step analysis of relevant interest and classification articulated above is made explicit.

In *Vlandis v. Kline*, the Court is even less helpful in elucidating the source of its close scrutiny of the classification. And given the Court's obvious—and two Justices' acknowledged[88]—effort to frame the relevant issue to avoid deciding the larger issue of the implications of the fundamental right to travel for tuition residency laws, *Vlandis* appears to promise to be less defensible than *Stanley*. Justice White's concurrence, however, offers an insight into the case which may help explain the *Vlandis* Court's conclusive presumption tack as other than an embodiment of caprice: the Connecticut law unconstitutionally circumscribes appellees' right to an education.[89] As *San Antonio Independent School District v. Rodriguez*[90] had very recently made clear, the Court did not view this right as fundamental. No more than review for rationality would thus obtain under the equal protection clause, and the correlation of recent out-of-state residence with lack of intent to establish permanent in-state residence is, however rough, at least true enough to supply the modicum of plausibility required. But even if *Rodriguez* has deprived *Brown v. Board of Education*[91] of whatever authority it may have offered for education's fundamentality—and my reading of *Brown*, which focused on equal educational opportunities and left any mention of "suspect classification" to its companion case *Bolling v. Sharpe*,[92] finds this authority quite impressive—*Brown* stands nonetheless as an affirmation of the powerful significance of that interest.[93] And insofar as deprivations of education, whether at the grade school or higher levels, may profoundly limit one's ability to exercise effectively and meaningfully the fundamental freedoms of speech and petition, state-imposed burdens on individual access to educational institutions should only reasonably come under close judicial scrutiny. In *Vlandis*, then, the Court was mindful that an applicant's ability to qualify for the substantially lower in-state tuition might be determinative of his ability to secure a higher education. Intensifying its standard of review to comport with the magnitude of the jeopardized interest, the Court required Connecticut to provide more individualized treatment for those denied "resident" status than would be expected with regulation of less significant interests.

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88. 412 U.S. at 455 (Marshall & Brennan, JJ., concurring).
89. *Id.* at 459 (White, J., concurring).
90. 411 U.S. 1, 35 (1973).
91. 347 U.S. 483 (1954).
92. 347 U.S. 497 (1954).
93. *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sweezy v. New Hampshire, 354 U.S. 234 (1957); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

Justification for the Court's invocation of conclusive presumption theory in *United States Department of Agriculture v. Murry* follows a similar line of reasoning. Again the triggering factor is an interest which the Court has denied inclusion among the select ranks of the fundamental, but accorded notable deference presumably because of its close nexus to fundamental freedoms. Thus, a right to subsistence may be the driving force behind the *Murry* opinion. The Court has not treated this right as fundamental: avowedly testing for only rationality in classification, the Court has confirmed the validity of laws providing some persons, but denying others, the means to acquire the basic necessities of food and shelter[94] as well as laws burdening by their operation the ability of some people to sustain themselves.[95] Accordingly, the law in *Murry*, though depriving some individuals of subsistence, need be only a rational means to promote a lawful objective in order to survive equal protection scrutiny. Rational, within the meaning of the two-tiered test, it surely is: Congress has taken aim at abuses of the food stamp program with a classification admittedly sweeping in its exclusionary thrust, but, as the Rehnquist dissent details,[96] no more so than traditionally allowed.

Goldberg v. Kelly[97] is evidence, however, that the Court has not been wholly unimpressed by the seriousness of deprivations of this sort. It has accorded great weight to a person's interest in satisfying his and his family's most elementary needs.[98] Studies correlating nutritional levels with degree of political activity[99] confirm, furthermore, that this sustenance interest is inextricably linked to enjoyment of the fundamental political freedoms of speech and petition.[100] And as the Court acknowledged in *Shapiro v. Thompson*,[101] the fundamental right of travel may be profoundly qualified by inadequate governmental deference to this interest. The significance of the interest affected by Congress' discrimination among potential food stamp recipients, therefore, provides a sound rationale for the *Murry* Court's firm

94. *See* Jefferson v. Hackney, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970). *See also Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1191-92 (1969).

95. *See* Lindsey v. Normet, 405 U.S. 56 (1972); James v. Valtierra, 402 U.S. 137 (1971).

96. 413 U.S. at 525-27 (Rehnquist & Powell, JJ., & Burger, C.J., dissenting).

97. 397 U.S. 254 (1970), especially at 264.

98. *See also* Sniadach v. Family Finance Corp., 395 U.S. 337, 340-42 (1969); Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

99. *See generally* A. KEYS, THE BIOLOGY OF HUMAN STARVATION (1950).

100. *See* Simson, *Another View of Rawls's Theory of Justice*, 23 EMORY L.J. 473, 488-89 (1974).

101. 394 U.S. 618 (1969).

demand for individual fairness in determinations of need and its rigorous examination of the overinclusiveness of the exclusionary measure.

Cleveland Board of Education v. LaFleur probably represents the Court's most explicit approximation to the analytic model expounded in this article. In *LaFleur*, the Court again failed to elucidate the first, equal protection step of the model. The Court was far less tenuous here than in the other cases, however, in associating its recourse to the exacting standard of conclusive presumption review with the presence of an interest or classification of special significance or untrustworthiness. The Court began its exposition by affirming the importance under the due process clause of the right to bear children, a right burdened by the school board regulations at issue insofar as the latter penalized the teacher for its exercise. In terms of the model, this due process inquiry presupposed that laws infringing upon the right to procreate do not invoke strict equal protection scrutiny. The *LaFleur* Court implicitly reached the decision, therefore, that the individual's interest in procreation is not fundamental; and, indeed, authority is not wanting in the Court's past decisions for the non-fundamental status of this interest. In *Buck v. Bell*,[102] a decision approved by the Court as recently as the abortion cases,[103] the Court upheld the state's power to deprive feeble-minded persons of their ability to procreate. Fundamental interest analysis and review could not have been more foreign to the Court's opinion: minimizing the seriousness of this deprivation—a "lesser sacrifice,"[104] according to Justice Holmes' majority opinion—the Court virtually scoffed at petitioner's equal protection attack on the patent underinclusiveness of the measure.[105] A more contemporary statement on the fundamentality of procreation is *Dandridge v. Williams*.[106] There the Court found to be appropriately "rationally based"[107] a measure designed to discourage procreation by a maximum welfare grant regulation which failed to take family size into account beyond five dependents in determining need. The law's inhibiting effect on procreation notwithstanding, therefore, lower tier scrutiny was applied. If equal protection thus requires no more than that the school board regulations in *LaFleur* not burden procreation irrationally, their validity should not be in doubt, for firm cut-off and return dates undeniably do serve the state's goals of continuity and competence in instruction in a manner no more crude than typically allowed.

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102. 274 U.S. 200 (1927).

103. Roe v. Wade, 410 U.S. 113, 154 (1973).

104. 274 U.S. at 207.

105. *Id.* at 208 ("[i]t is the usual last resort of constitutional arguments to point out shortcomings of this sort").

106. 397 U.S. 471 (1970).

107. *Id.* at 487.

On the other hand, the general acceptability of a classification does not settle the constitutional parameters of its application. The latter must be decided by a flexible due process inquiry which looks beyond the non-fundamental status of any right to bear children to that right's relative significance on the spectrum of democratic values. And a finding of its near-fundamental stature would seem to be compelled: in terms of precedent, *Skinner v. Oklahoma*,[108] where the Court seized upon the state's distinction among types of felons in its sterilization law to void this measure jeopardizing "one of the basic civil rights of man,"[109] witnesses the Court's substantial deference to individual enjoyment of this right; and with regard to the interaction between procreation and fundamental interests, the right to bear offspring, like the custodial interest in *Stanley*, bears an intimate relation to the guarantee of privacy. The *LaFleur* Court's close scrutiny, under the guise of conclusive presumption, of classifications discouraging enjoyment of this interest was thus appropriate as a matter of individual fairness.[110] As in the preceding conclusive presumption cases, however, the Court's invocation of this exacting review for overinclusiveness could not be justified by the artificial tactic of discovering a conclusive presumption. Rather, compelling vindication lay in express articulation of the considerations which prompted the Court in each case to take the mystifying detour of "conclusive presumption" to arrive at its predetermined destination.

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108. 316 U.S. 535 (1942).

109. *Id.* at 541.

110. Further support for the *LaFleur* Court's demand for more individualized determinations may lie in the untrustworthy nature of the classification. Thus, although the Court made no attempt to elucidate this possible impetus to conclusive presumption theory, a sex classification—an untrustworthy, if not suspect, species, *see* p. 235 & note 79 *supra*—may be discerned: the law singles out women for disadvantage on the basis of a sex-specific disability, but fails to lay down guidelines for the effect of sex-specific disabilities on the work allowed male teachers.

With regard to the post-birth regulations in *LaFleur*, male-specific disabilities such as prostatectomies and circumcision would seem analogous to a women's pregnancy: regulations establishing a mandatory non-return period after suffering these male-specific disabilities would operate on the same principle. Close examination of the post-birth regulations as sex classifications would thus seem appropriate. *Cf.* Geduldig v. Aiello, 417 U.S. 484, 501-03 (1974) (Brennan, Douglas & Marshall, JJ., dissenting). *But cf. id.* at 496-97 n.20.

On the other hand, if no *comparable* male disabilities in fact exist, the school board regulations cannot properly be characterized as sex classifications. Thus, insofar as the pre-birth regulations single out pregnancy for special treatment because of the generally predictable nature of its course, these regulations may lack a true analogue in male disabilities. Basically, they would seem to be only disability classifications, ones distinguishing between different types of disabilities in order to serve the legislative goals. *Cf.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 653 n.2 (1974) (Powell, J., concurring).

III. QUALIFYING THE COURT'S SUCCESS

If this account of the Court's activities under the rubric of "conclusive presumption" is accurate,[111] the Court has developed an analytic model with

111. A theory drawn from cases in which the Court relied on a conclusive presumption rationale may not adequately explain all cases in which the Court arguably might have decided in terms of conclusive presumption but did not. Since the Court's use of conclusive presumption still appears to be in its experimental stages, this lack of theoretical consistency in noninvocation of the doctrine would not be surprising. Nevertheless, at least the two occasions on which conclusive presumption has not been employed as the basis of decision, but has figured prominently in the Court's or a dissenting Justice's opinion, are explicable in terms of the model outlined in this article.

In Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 376-77 (1973), the Court briefly disposed of the claim, accepted by the Fifth Circuit, *see* Mourning v. Family Publications Serv., Inc., 449 F.2d 235 (5th Cir. 1971), that the Four Installment Rule promulgated by the Federal Reserve Board constitutes a conclusive presumption violative of due process. This regulation implementing the Truth in Lending Act requires that a creditor make certain disclosures whenever he offers credit to a consumer "for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments." 12 C.F.R. § 226.2(k) (1972). As Chief Justice Burger's opinion for the Court noted, this regulation was promulgated to combat the practice of hiding a finance charge in the price of goods sold. 411 U.S. at 366.

The Fifth Circuit made itself an obvious target for reversal when it held the regulation constitutionally defective because "[t]he presence of a finance charge is conclusively presumed from the nature of the transaction, involving payment in more than four installments." 449 F.2d at 241. The regulation establishes no such presumption. Rather, all that it conclusively presumes is that transactions meeting the four installment criterion better lend themselves to covert violations of disclosure requirements than do other transactions, and thus comprise an appropriate focus for deterrent efforts. In reversing, the Court essentially so argued. *See* 411 U.S. at 377.

In terms of the analysis suggested in this article, the Court is almost certainly right. The classification among types of creditors lacks any markings of suspicion, and the interest affected—relative freedom in business operations from government regulation—falls notably short of constitutional magnitude. In sum, since the regulation is obviously a rational attempt to deal with the evasion problem presented, *see id.* at 374, equal protection is satisfied; and the nature of the classification and interest at issue warrant the conclusion that due process requires no opportunity to rebut the presumption inherent in the regulation.

Conclusive presumption is also discussed at some length in Justice Marshall's dissent in Marshall v. United States, 414 U.S. 417 (1974). In *Marshall*, the Court upheld Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. §§ 4251-55 (1970), which makes addicts with two or more prior felony convictions ineligible for rehabilitative commitment in lieu of a prison term for a new crime, however nonviolent. Justice Marshall's dissent, joined by Justices Douglas and Brennan, attacked the law for various constitutional inadequacies, including its incorporation of "a conclusive and irrebuttable presumption that a person with two or more felony convictions is not likely to be rehabilitated through treatment." 414 U.S. at 435.

In arguing that such a presumption is disfavored "particularly . . . where an interest as important as personal liberty is at stake," *id.*, the dissent is predicating its conclusive presumption tack on the type of sliding-scale due process analysis suggested in this article. Justice Marshall is overstating the significance of the interest at issue, however,

much to commend it. As an alternative to the sliding-scale equal protection test also of apparent recent origin in the Court, this two-step approach to legislative classifications is attractive in its flexibility. Celebration of this attempt to resolve problems not satisfactorily dealt with under the equal protection clause, however, must proceed with appropriate recognition of a potential for abuse in this model which would not be eliminated by the model's express adoption by the Court: employment of this mode of analysis as a substitute for adding new interests and classifications to the ranks of the fundamental and suspect[112] despite the constitutional basis for doing so. If interests and classifications qualify for strict equal protection scrutiny, it is not enough to review for fundamental fairness, the second step of the model; the first step must be taken with no less seriousness than before the evolution of this useful device for handling interests and classifications of variable significance and untrustworthiness. For allowing the legislature to continue using the original classification and requiring the individual to come forward with preponderant proof of specific unfairness in application—the remedy where equal protection is satisfied but due process is not—*does* burden the individual and his or her freedoms. And it is the essence of the equal protection doctrines of suspect classification and fundamental interest to relieve individuals of any such burdens.

In this regard, I should add that my account of the Court's implicit decisions in the conclusive presumption cases that the interests and classifications at issue were not fundamental or suspect should not be read as indicating my agreement with those decisions. In particular, I question the Court's approach to sex classifications,[113] for the latter do appear to bear the indicia of suspicion informing the Court's suspect classification cases: they are the result of comparative generalizations and cost-benefit balances regarding a group comprising a majority in lawmaking bodies (men) and a group traditionally excluded in the extreme from both formal and informal input into legislative decisions (women).[114] By the doctrine of suspect classification, the Court has extended great protection to persons within such "outsider"

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for the liberty involved is not the difference between imprisonment and free intercourse in society but, instead, between confinement in a prison and confinement in a narcotics treatment facility. And since the classification is drawn along lines not especially untrustworthy—narcotic addicts with less than two prior felony convictions/addicts with two or more—the Court's failure to require more process for the excluded addict by taking a conclusive presumption route is understandable in terms of the proposed model.

112. *See* notes 70 & 72 *supra.*

113. *See* pp. 233-35 & notes 79 & 110 *supra. Compare* Frontiero v. Richardson, 411 U.S. 677 (1973), *and* Reed v. Reed, 404 U.S. 71 (1971), *with* Geduldig v. Aiello, 417 U.S. 484 (1974), *and* Kahn v. Shevin, 416 U.S. 351 (1974).

114. *See* p. 231 & notes 73 & 74 *supra.*

groups from these "we-they" classifications; the classification fails, except under extraordinary circumstances, unless the state can demonstrate its perfection.[115] If women are entitled to this measure of protection from unjust discrimination, then, it is plainly no adequate substitute to require each individual woman who feels injured by a sex classification to bear the monetary and emotional costs of trying to demonstrate the unfairness of the classification in her case. For purposes of this article, further pursuit of my differences with the Court's analysis of sex classifications is probably best deferred. I raise the issue here, however, to illustrate what I perceive to be the principal pitfall of a basically sound approach.

With this reservation, then, I offer the model described at length above as a major innovation by the Court in reconciling the competing demands of the classification process to minimize the state's costs in pursuing lawful goals and to maximize fairness to individuals. The time is long overdue, therefore, for the Court to lift the veil of "conclusive presumption" off of its creation and put its workings on display for much-deserved attention by courts and critics.

115. *See* note 8 *supra.*